IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR

FRIDAY, THE 8TH DECEMBER 2006 / 17TH AGRAHAYANA 1928

OP.No. 16986 of 1998(V)

PETITIONERS:

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1. AMEER AHAMMED, AGED 44 YEARS, S/O. PADIYATH MANAPPAT HYDROSE, NJALAKOM KARA, THRIKKAKARA NORTH VILLAGE, KALAMASSERY, REPRESENTED BY HIS POWER OF ATTORNEY HOLDER-DR.N.K.MOHAMMED, S/O.NAMBOODIRIMADATHIL ' KUNJU MOIDEEN, AGED 64 YEARS, RESIDING AT A1-NAHADA, KALABHAVAN ROAD, THRIKKANARVATTOM DESOM, ERNAKULAM VILLAGE, KANAYANNUR TALUK, COCHIN-18.

2. MRS.ANITHA AMEER, W/O.PADIYATH AMEER AHAMMED, AGED 36 YEARS, DO. DO.

3. SUHAIL AMEER, MINOR, AGED 15 YEARS, S/O. PADIYATH AMEER AHAMMED, DO. DO.

4. FATHIMA AMEER, MINOR AGED 12 YEARS, D/O.DO DO.

(ALL THE PETITIONERS ARE REPRESENTED BY THEIR POWER OF ATTORNEY HOLDER-DR. N.K.MOHAMMED.)

BY ADV. SRI.THOMAS V.JACOB

RESPONDENTS:

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1. VILLAGE OFFICER, THRIKKAKKARA NORTH VILLAGE, KANAYANNOOR TALUK, ERNAKULAM.

2. TAHASILDAR, KANAYANNOOR TALUK, ERNAKULAM.

3. REVENUE DIVISIONAL OFFICER, FORT COCHIN.

4. DISTRICT COLLECTOR, CIVIL STATION, KAKKANAD, ERNAKULAM.

5. STATE OF KERALA, REPRESENTED BY ITS SECRETARY, FINANCE DEPARTMENT, SECRETARIATE, TRIVANDRUM-1

BY GOVERNMENT PLEADER SRI.JULIUS XAVIER

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 08/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP.NO.16986 OF 1998

ORDER ON C.M.P.NO.30060 OF 1998 IN OP.NO.16986 OF 1998-V

DISMISSED.

8-12-2006 SD/-K.BALAKRISHNAN NAIR, JUDGE.

APPENDIX:

PETITIONER'S EXHIBITS:

EXT.P1.PHOTOSTAT COPY OF TAX RECEIPT DATED 12-8-98.

EXT.P2.PHOTOSTAT COPY OF POWER OF ATTORNEY EXECUTED BY IST PETITIONER FOR SUHAIL (3RD PETITIONER)

EXT.P2A. PHOTOSTAT COPY OF POWER OF ATTORNEY EXECUTED BY GUARDIAN-IST PETITIONER AMEER AHAMMED.

EXT.P2B. PHOTOSTAT COPY OF POWER OF ATTORNEY EXECUTED BY AMEER AHAMMED.

EXT.P2C. PHOTOSTAT COPY OF POWER OF ATTORNEY EXECUTED BY ANITHA AMEER(2ND PETIOITNER)

EXT.P3. PHOTOSTAT COPY OF AGREEMENT DATED 1-1-91.

EXT.P4. PHOTOSTAT COPY OF THE COVERING LETTER DATED 13-11-92 OF N.K.HYDER ALI.

EXT.P5. PHOTOSTAT COPY OF THE NOTICE OF the KALAMASSERY MUNICIPALITY DATED 17-12-92.

EXT.P5A. PHOTOSTAT COPY OF the NOTICE OF THE KALAMASSERY MUNICIPALITY DATED 17-12-92.

EXT.P5B. PHOTOSTAT COPY OF THE NOTICE OF the KALAMASSERY MUNICIPALITY DATED 17-12-92.

EXT.P5C.PHOTOSTAT COPY OF THE NOTICE OF THE DO. MUNICIPALITY DATED 17-12-92.

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EXT.P5G.PHOTOSTAT COPY OF THE NOTICE OF THE DO MUNICIPALITY.

EXT.P5H. PHOTOSTAT COPY OF DO.

EXT.P6. PHOTOSTAT COPY OF the ASSESSMENT ORDER DATED 25-1-94 BY the 2ND RESPONDENT.

EXT.P7. PHOTOSTAT COPY OF the DEMAND NOTICE DATED 25-1-94.

EXT.P8. PHOTOSTAT COPY OF the MEMORANDUM OF APPEAL.

EXT.P9. PHOTOSTAT COPY OF the ORDER OF THE 3RD RESPONDENT DATED 28-4-97.

EXT.P10. PHOTOSTAT COPY OF the RECEIPT DATED 3-3-94.

EXT.P11. PHOTOSTAT COPY OF the REVISION UNDER SE.13 OF THE BUILDING TAX ACT BEFORE THE 4TH RESPONDENT.

EXT.P12. PHOTOSTAT COPY OF THE RECEIPT DATED 2-7-97.

EXT.P13. PHOTOSTAT COPY OF the ORDER NO.K.DIS.41959/97/B10 DATED 22-6-98.

EXT.P14. PHOTOSTAT COPY OF THE ENTRIES in the PASS BOOK OF THE PETIOITNER NO.3 FROM 1-8-91 TO 3-2-95.

EXT.P15. PHOTOSTAT COPY OF the ENTRIES IN the PASS BOOK OF the PETITONER NO.4 FROM 1-8-91 TO 3-2-95.

EXT.P16. PHOTOSTAT COPY OF the NOTICES DATED 29-7-98 BY THE VILLAGE OFFICER, THRIKKAKKARA NORTH.

EXT.P17. TRUE COPY OF THE TABULAR STATEMENT SHOWING the AMOUNT OF TAX.

EXT.P18. PHOTOSTAT COPY OF the LETTER DATED 5-11-93 SENT BY the POWER OF ATTORNEY HOLDER N.K.HYFRALI TO THE TAHSILDAR, KANAYANNOOR TALUK.

EXT.P19. PHOTOSTAT COPY OF ARGUMENT NOTES SUBMITTED BEFORE the 3RD RESPONDENT.

EXT.P20. PHOTOSTAT COPY OF PREVIOUS DOCUMENT EXECUTED BY HT EPETITIONERS 1 AND 2.

EXT.P21. PHOTOSTAT COPY OF THE PREVIOUS DOCUMENT EXECUTED BY PETITIOENRS 1 AND 2.

K.BALAKRISHNAN NAIR, J.

O.P.NO.16986 of 1998-V

Dated this the 8th day of December, 2006

JUDGMENT

The petitioners have approached this Court, challenging the assessment of building tax of a building owned by them. It is a commercial-cum-residential complex constructed in Sy.No.435/1 and 435/7B of Thrikkakkara North Village in Kanayannur Taluk. A five storied residential-cum-commercial building complex was constructed by the petitioners in the said land purchased in 1989. The construction was started in 1989 and completed in 1992. The petitioners entered into a registered agreement on 1-1-1991 dividing the building into 4 parts. The 3rd and 4th petitioners were given right for constructing the 4th and 5th floors at their own costs. Ext.P3 is the said agreement. After the completion of the building, returns were filed under Sec.7 of the Kerala Building Tax Act before the assessing authority on 13-11-1992. The Kalamassery Municipality allotted 4 separate Door Numbers to the portions of the building owned by the petitioners. The said local authority assessed property tax separately from the petitioners. While so, the petitioners were served with Ext.P6 assessment order dated 25-1-1994 by the Tahasildar, passed under the Kerala Building Tax Act. They filed appeal before the Revenue

Divisional Officer, mainly raising two contentions. The first ground is that the building should be assessed separately in the name of the 4 petitioners. Subsequently it was contended that a portion of the building is used for residential purpose and therefore assessment for that portion should be at the rate applicable to residential building. But, the entire assessment has been made under the head other building. The appellate authority dismissed the appeal by Ext.P9. The petitioners filed revision before the District Collector. That was also dismissed by the Collector, by Ext.P13 order. Both the contentions raised by the petitioners were negatived. Hence, this original petition, challenging those orders. The points canvassed by the petitioners before the appellate and revisional authorities were urged before this Court also.

2. The respondents have filed a counter affidavit supporting the impugned proceedings. According to them, the second petitioner is a house wife and petitioners 3 and 4 are minor children. So, it cannot be assumed that all the petitioners have raised funds separately, pooled the same and constructed the same jointly. So, going by explanation 2 to Section 2 (e) of the Kerala Building Tax Act, the building cannot be treated as a separate apartment. The petitioners have filed reply affidavit reiterating their contentions.

3. Heard. Going by the facts of the case, I feel that the

contention that the building should be assessed separately as they have jointly constructed, in terms of explanation 2 to Section 2 (e) of the Kerala Building Tax Act cannot be accepted. In this case as evident from the pleadings, Ext.P3 agreement was executed after commencement of the construction. Prima facie, the contention of the respondents that the cost of construction was made by the first petitioner has to be accepted, having regard to the fact that the second petitioner is the house wife and petitioners 3 and 4 are minor children. This view finds support from the Division Bench decision of this Court in Shenoy Real Estates (P) Ltd. Vs. Tahasildar (2004 (1) KLT 133). But, on the second point, I feel that the petitioners are entitled to succeed, in view of the decision in Sukumaran Vs. Tahasildar (1999 (2) KLT 373). The portion of the building which is occupied as residential area would be subject to building tax only at the rate provided for residential building in the schedule to the Act. The stand of the respondents that if any portion of the building can be treated coming under other building, the entire area should be assessed treating the building as other building cannot be accepted. Accordingly, the orders to the extent they assess the building at the rate applicable to other buildings is quashed. The matter is remitted to the Tahasildar, Kanayannur Taluk, to make fresh assessment of building tax by segregating the commercial area and residential area

and charging separate rates as provided under the Schedule to the Kerala Building Tax Act for the respective area. Orders in this regard shall be passed by the Tahasildar.

The original petition is disposed of as above.

K.BALAKRISHNAN NAIR,JUDGE.

MS

K.BALAKRISHNAN NAIR, J.

O.P. No. 16986 of 1998-V

J U D G M E N T

DATED 8th DECEMBER,2006